

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34908

STATE OF IDAHO,	)	Unpublished Opinion No. 716
	)	
Plaintiff-Respondent,	)	Filed: December 8, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
THOMAS JASON REUSSER,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Judgment of conviction for felony driving under the influence, affirmed; order relinquishing jurisdiction, vacated and remanded.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant. Elizabeth A. Allred argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

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SCHWARTZMAN, Judge Pro Tem

Thomas Jason Reusser appeals from his judgment of conviction for felony driving under the influence (DUI). Reusser also appeals from the district court's order relinquishing jurisdiction. For the reasons set forth below, we affirm Reusser's judgment of conviction, but vacate the district court's order relinquishing jurisdiction and remand for further proceedings.

I.

FACTS AND PROCEDURE

Police responding to a hit-and-run accident on private property observed Reusser driving his damaged vehicle near the scene. The officers effectuated a stop of Reusser's vehicle and detected a strong odor of alcohol. Reusser also had impaired memory, slurred speech and glassy, bloodshot eyes. Reusser was belligerent and uncooperative with police instructions and refused evidentiary testing. A search of his vehicle revealed a small baggie of marijuana. Reusser was charged with felony DUI, enhanced due to another felony DUI conviction within the previous

fifteen years, I.C. §§ 18-8004 and 18-8005(7);<sup>1</sup> misdemeanor possession of marijuana, I.C. § 37-2732(c); and misdemeanor resisting and obstructing officers, I.C. § 18-705.

At trial, the state dismissed the charge of possession of marijuana and proceeded on the other two charges. A jury found Reusser guilty of DUI but acquitted him of the resisting and obstructing offense. The trial proceeded to a second phase to determine the allegation of a prior felony DUI conviction. During that proceeding, the state moved to amend the information as it pertained to Reusser's prior conviction. The information originally provided that Reusser had previously been convicted of a violation of I.C. § 18-8004, when in fact he had actually been found guilty of aggravated DUI, a violation of I.C. § 18-8006. The district court allowed the oral amendment, and the jury found that Reusser had a prior felony conviction under I.C. § 18-8006 within the past fifteen years. The district court sentenced Reusser to a unified term of ten years, with a minimum period of confinement of two years, and retained jurisdiction.

After Reusser completed the rider program, the district court held a review hearing. At the hearing, the court observed that Reusser had done well during the period of retained jurisdiction, but nonetheless relinquished jurisdiction and ordered Reusser's sentence into execution. Reusser appeals.

## II. ANALYSIS

### A. Prosecutorial Misconduct

Reusser argues that the prosecutor committed misconduct during closing argument, which prejudiced his right to a fair trial. Reusser acknowledges that no objection was made to the comments below, but contends that the misconduct constituted fundamental error. While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. A fair trial is not necessarily a perfect trial. *Id.*

When there is no contemporaneous objection, a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in

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<sup>1</sup> After subsequent amendments, this statutory provision is now found at I.C. § 18-8005(9).

fundamental error. *Id.* Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. *Field*, 144 Idaho at 571, 165 P.3d at 285. The test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *State v. Pecor*, 132 Idaho 359, 368, 972 P.2d 737, 746 (Ct. App. 1998).

When the defendant did not object at trial, our inquiry is, thus, three-tiered. *See Field*, 144 Idaho at 571, 165 P.3d at 285. First, we determine factually if there was prosecutorial misconduct. If there was, we determine whether the misconduct rose to the level of fundamental error. Finally, if we conclude that it did, we then consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course

is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases “I think” and “I believe” altogether. *Id.*

Appeals to emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *Pecor*, 132 Idaho at 367, 972 P.2d at 745. The prosecutor’s closing argument should not include disparaging comments about opposing counsel. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984).

In this case, the prosecutor began his closing remarks as follows:

Most people by the time they’ve hit first or second grade know the appropriate way to act. This defendant doesn’t. And that’s what I’m asking you to do today, is to show him what’s appropriate behavior and what we tolerate and what we won’t.

....

Let me zoom in here. Okay. And there are some of these [jury instructions] that we need to talk about and some of these that we can just move right over. . . .

[Jury Instruction No. 6 provides]: While under the influence of alcohol or drugs. And we can -- we can look at overwhelming evidence that was given today, and we can without a doubt say that, yeah, he was doing that.

The prosecutor then reviewed the evidence presented at trial that Reusser crashed his vehicle in an empty parking lot at night and had a strong smell of alcohol. Regarding Reusser’s contention that the smell was due to a friend’s vomit, the prosecutor argued:

Now, was it alcohol or throw up? You heard the audio. You heard [Reusser] that it was throw up. You heard him say when asked why it wasn’t on his clothes and on his face, because he changed his clothes. He’s been caught in a lie. Because his story wasn’t consistent today with that. It was alcohol because there was no smell of throw up. It was a smell of alcohol. There was no throw up on him. There was no throw up in the car. There was no throw up on his friend. All there was, was the smell of alcohol, and the smell was alcohol coming from one place, and it was his mouth.

The prosecutor next reviewed the additional evidence presented at trial that Reusser also had bloodshot, glassy eyes and slurred speech. Then he argued:

And then [Reusser] said kind of the impaired memory. Couldn’t remember things. Couldn’t remember that he drank that night, because he said he

had none. And all the evidence shows he did. He said that he was thrown up on. There was no evidence that he was thrown up on. And then what did he say today? It's honestly laughable. He had a concussion. Why can't he remember everything? Why can't he remember all the details today? Because he had a concussion. What a convenient excuse to come in here on the day of trial. He can remember things that help him, but he can't remember things that don't because he had a concussion.

The prosecutor then reviewed the evidence concerning Reusser's refusal to cooperate with any field sobriety testing or blood alcohol testing and concluded:

And I promised you this morning when I opened that the evidence would be overwhelming, and it is. I'm going to ask you now to go back there and to teach Mr. Reusser what's appropriate behavior and what we tolerate in this society.

After the prosecutor's closing argument, defense counsel argued that Reusser was not driving under the influence and that Reusser's belligerent behavior was a result of frustration and stubbornness, not drunkenness. Counsel contended that the state had only presented vague and flimsy evidence of slurred speech and glassy eyes and that strong evidence existed that police observations of DUI suspects were inaccurate 20 percent of the time. He concluded that this case was not about inappropriate behavior, but whether Reusser was driving under the influence. In rebuttal, the prosecutor contended that it was inappropriate to drive under the influence and put others at risk; therefore, the case was about inappropriate behavior. The prosecutor also argued that the evidence was comprised of more than just slurred speech. He reviewed a police officer's testimony that this police department had a much higher rate of accuracy and that the officer had never observed anyone in Reusser's condition who was not intoxicated beyond the legal limit. Concerning Reusser's testimony that he could not remember specifics of the night of his arrest due to his impaired memory, the prosecutor argued:

And let's just call impaired memory for what it is. He's lying. He wants you to come in here, and he wants you to believe him. He wants you to believe that he's telling the truth, and he's not. He said on the tape he changed his clothes. He's now saying he didn't. He said they were trying to fix the car when the police pulled up. That wasn't the case. He said they just happened to leave the dialysis center, the parking lot where they were. The police had shined a spotlight on them. They claimed they never saw the police lights. But you know that the policeman was zipping around and yet --

He claimed that he was injured by the police in being taken down; however, he refused the paramedic's help. And he didn't complain about his

shoulder until he was in the intox room. That's when he complained about it. And he never said it was because they slammed me down or anything like that.

The prosecutor then evaluated the testimony of Reusser's witnesses:

And then I think what's really sad here is he pulled his friends in to lie for him. [A.R.] -- that's sad that she would come in here and do that. Because before, when she thought she wasn't going to have to testify, she told the investigator in my office that she saw [Reusser] drinking two to three beers at her house that night at an early St. Patrick's Day party. Now, she's trying to say -- come in here, having to look her friend in the eye. She's going to lie for him and say, no, he had one to two beers the day after.

You can understand why his pregnant girlfriend would come in and say those things. And quite honestly, it was apparent his friend was lying. He couldn't get his story straight when pressed on it -- selective memory. He remembers the things that he thinks will help his friend. He can't remember much else.

Go back and look at these instructions, Instruction 12 and Instruction 16. It's clear that he was drunk when he was driving that night. I want you all to come back here with a guilty verdict.

Reusser claims that the prosecutor's comments during closing argument and rebuttal were inappropriate appeals to the fears, passions, and prejudices of the jury. He contends that they appealed to the jury's concern for public safety and portrayed Reusser and his counsel as approving of drunk driving. Furthermore, Reusser argues that the prosecutor expressed an inappropriate personal belief as to the truth or falsity of the witnesses' testimony. Having reviewed the record, we disagree.

The prosecutor's argument reviewed the evidence and asked the jury to come to a conclusion that Reusser's conduct was inappropriate behavior in our society. Reusser's counsel argued that the case was not about the appropriateness of the behavior. The prosecutor responded that drunk driving was inappropriate behavior and, therefore, this case was about the appropriateness of the conduct. These comments were not improper. Nor is it improper for a prosecuting attorney to express an opinion on the truth or falsity of a witness' testimony when such opinion is based upon the evidence. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. This Court has previously held that it was not misconduct for a prosecutor to argue that the reason there were inconsistencies in a defendant's testimony was because he lied under oath. *Kuhn*, 139 Idaho at 716, 85 P.3d at 1115. Here, the prosecutor reviewed the evidence and provided several examples of the inconsistencies found in the testimony of Reusser and other

witnesses. The prosecutor also suggested that the reason for the inconsistencies was that the witnesses were lying. Because these comments were based on the evidence and the inconsistencies found therein, they did not amount to misconduct.

## **B. Sufficiency of the Evidence**

Reusser claims that the district court's oral amendment of the information during the second phase of his trial also changed the charge for the underlying offense, thereby nullifying the jury's verdict. He does not challenge the amendment, but contends only that insufficient evidence was presented at trial to find him guilty either under the original or amended information. In essence, he contends that under the original information he could not be found to have a previous felony conviction for violation of I.C. § 18-8004 because his prior conviction was actually for I.C. § 18-8006, *i.e.* aggravated DUI. Furthermore, Reusser contends that, as articulated by the district court, the oral amendment changed the underlying charge from I.C. § 18-8004 to I.C. § 18-8006. As a result, he argues that his conviction was invalid because insufficient evidence was presented at trial to convict him under I.C. § 18-8006 of aggravated DUI.

The information charged Reusser with a violation of I.C. § 18-8004, enhanced to a felony for a prior felony conviction of I.C. § 18-8004 within the past fifteen years. After Reusser was found guilty of the present DUI offense, the district court proceeded to the second phase of trial to determine the existence of the prior conviction. During that proceeding, the previous judgment of conviction was admitted into evidence and the district court observed that it was actually for aggravated DUI, a violation of I.C. § 18-8006. At that time, the prosecutor moved to amend the information to accurately reflect the prior conviction, arguing that the amendment would not prejudice Reusser in any way. After an objection, trial counsel sought to clarify that the state was moving to amend the information as it pertained to the prior conviction, from I.C. § 18-8004 to I.C. § 18-8006. Trial counsel again objected to amending the second part of the information and moved to dismiss that charge. The district court then ruled:

Well, they haven't closed their case. This is their case in chief on the issue of the second -- of the enhanced.

....

... And I would prefer to not make the decision, because I would prefer it to be a clean case. However, I think that the State is entitled to amend. Because I don't see the prejudice to the defendant. The defense -- the defense has a copy of the judgment of conviction. It clearly said a violation of 18-8006.

The defense is clearly aware that the State is alleging a prior felony conviction, Driving Under the Influence of Alcohol within a period of 15 years. And it appears they simply erred in putting down the wrong code section.

But everything else is -- and that's the only change I see that would be made in the information, is that they put down an improper code section. That's it.

....

The Court allows the amendment requested by the State on the information, and we'll change that to Idaho Code 18-8006.

....

So on the face of the Information, I've changed 18-8004 to 18-8006. And then on the second page of the Information, I've changed Count I to allege 18-8006. Okay. And then I'm just going to change the jury instructions to 18-8006.

The "face of the information," to which the district court referred, alleged that Reusser was accused of the crime of felony DUI with a prior conviction within fifteen years pursuant to I.C. §§ 18-8004, 8005(7). The second page of the information provided, in Count I, that Reusser had previously "pled guilty to or [was] found guilty of a prior felony conviction of I.C. § 18-8004 within the previous fifteen years." Reusser argues that prior to the amendment, insufficient evidence was presented to prove that he had a previous DUI felony conviction under I.C. § 18-8004. Reusser also contends that after the amendment, insufficient evidence was presented to prove that he violated I.C. § 18-8006 in the present offense.

Reusser's argument is an attempt to capitalize on a misstatement by the district court. The court misspoke when it orally amended the face of the information. However, it is clear from the record that the district court, as well as both parties, understood there would be only an amendment to the information as it related to Reusser's prior DUI conviction.<sup>2</sup> At that point in the proceedings, Reusser had already been found guilty by a jury of a violation of I.C. § 18-8004. The judgment of conviction also accurately reflects the correct Idaho Code section for the present offense. The district court was not attempting to change the information as it related to the substantive crime for which Reusser had just been found guilty.

Moreover, I.C.R. 7(b) provides, in pertinent part:

The indictment or information shall state for each count the official or customary citation of the statute, rule or regulation or other provision of law which the defendant is alleged to have violated. *Error in the citation or its*

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<sup>2</sup> The jury verdict form for the second phase of trial accurately reflects the amendment from a prior conviction of I.C. § 18-8004 to a prior conviction of I.C. § 18-8006.



*omission shall not be grounds for . . . reversal of the conviction if the error or omission did not mislead the defendant to the defendant's prejudice.*

(Emphasis added). Thus, even if the district court had incorrectly amended the information as it pertained to the present offense from I.C. § 18-8004 to I.C. § 18-8006, such an error would not be grounds for reversal since the trial on Reusser's violation of I.C. § 18-8004 had already been completed. Therefore, Reusser was not misled or prejudiced in any way by the district court's oral amendment. Furthermore, the prior judgment of conviction for aggravated DUI pursuant to I.C. § 18-8006 was sufficient to find him guilty of the prior felony.

### **C. Relinquishment of Jurisdiction**

Reusser argues that the district court abused its discretion when it relinquished jurisdiction over him. He contends that the district court's decision was retaliatory against him for exercising his rights to seek appellate review and reconsideration of his sentence. The state responds that the district court's decision not to place Reusser on probation is supported by his criminal history and prior record of poor performance on probation and parole.

The decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. *State v. Hood*, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); *State v. Lee*, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

At the hearing, the district court noted that it had reviewed the rider report and concluded that Reusser had done very well in the program. The court asked if the prosecutor had any objections to placing Reusser on probation. The prosecutor objected based on the grounds he had argued at the original sentencing hearing concerning Reusser's prior criminal history and inability to comply with conditions of probation and parole. The prosecutor further noted that this was Reusser's second felony DUI and that he was arrested on the present charge shortly after being released from prison for his first felony DUI offense. The district court then reiterated that

these factors were known at the time that it retained jurisdiction and that Reusser had performed an excellent rider.

The court then observed, however, that Reusser had appealed his sentence. The tone of the proceedings abruptly shifted as the trial judge questioned Reusser's motives for filing an appeal. The court concluded that Reusser created extra work for its busy calendar as well as the appellate courts through his attempts to gain further relief and refusal to accept responsibility for his actions. The district court found it galling that, despite its leniency, Reusser still filed an appeal and an I.C.R. 35 motion for reduction of sentence because he did not believe the court was being fair enough. In the district court's estimation, the problem is compounded when defendants take advantage of the free legal representation they receive through the public defender's office, thereby creating a greater burden on the judicial system. After several attempts by Reusser and his counsel to explain, the district court held that it had changed its mind about Reusser because he would not accept responsibility for his actions and that it was going to relinquish jurisdiction based on the concerns articulated by the state.

At oral argument on this appeal, the state conceded that the district court's decision was based, at least implicitly, on inappropriate consideration of Reusser's exercise of his statutory rights. The state argued, however, that any error was harmless because Reusser did not have a right to be placed on probation and substantial reasons existed to relinquish jurisdiction. We acknowledge that Reusser did not have a right to probation or even a right to a hearing on his rider review. *See State v. Coassolo*, 136 Idaho 138, 140-33, 30 P.3d 293, 295-98 (2001). Additionally, the district court could have found that Reusser's criminal history and inability to comply with conditions of probation and parole supported relinquishment of jurisdiction and execution of the original sentence. However, after reviewing the transcript of the rider review hearing, we cannot conclude that the court's determination was based entirely on an exercise of reason.

The district court's expression of its frustration with Reusser's I.C.R. 35 motion and appeal of sentence raises a clear implication that Reusser's decision to pursue such rightful avenues affected the trial court's decision. To the extent that the court's determination was based on Reusser's decision to seek appeal and reconsideration of his sentence, and not on the other valid reasons supporting relinquishment of jurisdiction, it was not an exercise of reason based on valid legal principles. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982)

(holding that an individual may not be punished for exercising a potential statutory or constitutional right); *see also State v. Heffern*, 130 Idaho 946, 950, 950 P.2d 1285, 1289 (Ct. App. 1997) (holding that it was error for a district court to consider a defendant's refusal, at a sentencing hearing, to admit to crimes other than the one for which he was convicted pursuant to his Fifth Amendment right to remain silent). Therefore, we conclude that the district court's decision to relinquish jurisdiction, at least partially on this basis, constituted an abuse of discretion.

As relief, Reusser requests that this Court reverse the district court's order relinquishing jurisdiction and order it to impose probation. We decline to order the district court to place Reusser on probation. Rather, we believe the appropriate remedy is to remand to the district court for another rider review hearing before a different district judge. *See Heffern*, 130 Idaho at 950, 950 P.2d at 1289.

### **III.**

#### **CONCLUSION**

The prosecutor's comments during closing argument and rebuttal closing argument were not improper. The evidence was sufficient to find Reusser guilty of DUI pursuant to I.C. § 18-8004, enhanced to a felony because of a prior conviction of I.C. § 18-8006 within the last fifteen years, and Reusser was not prejudiced by the court's oral amendment. However, the district court abused its discretion when it relinquished jurisdiction over Reusser at his rider review hearing on an improper basis. Accordingly, Reusser's judgment of conviction for felony DUI is affirmed. The district court's order relinquishing jurisdiction is vacated, and the case is remanded for further proceedings consistent with this opinion.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**